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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AMERICAN BANKERS ASSOCIATION
AMERICAN COLLEGE OF REAL ESTATE LAWYERS,
AMERICAN COUNCIL OF LIFE INSURANCE,
COMMERCIAL FINANCE ASSOCIATION,
EQUIPMENT LEASING ASSOCIATION OF AMERICA,

Petitioners,

v.

FRANK J. KELLEY, ATTORNEY GENERAL
OF THE STATE OF MICHIGAN, *ET AL.*,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONER

The oppositions to certiorari by the Chemical Manufacturers Association (CMA) and the State of Michigan (Michigan) warrant a brief response. We note that the Solicitor General vigorously supports the EPA Rule and does not oppose certiorari.

1. The validity of EPA's "Lender Liability Rule" is a matter of national public importance that should be reviewed by this Court. There will never be a "square" conflict in the circuits, since only the D.C. Circuit can

review EPA's CERCLA rules. *See* 42 U.S.C. § 9613(a). Yet settled principles support this Court's review of the decision below, because of the vital importance of the EPA Rule for commercial lending and borrowing. *See, e.g.*, R. Stern, et al., *Supreme Court Practice* § 4.13, pp.187-188 (7th ed. 1993) (importance of federal statutory and regulatory issues, with or without conflict among lower courts, frequently warrants review by this Court); Supreme Court Rule 10.1(c).

The court of appeals' decision, if left standing, will cripple commercial lending for years. As both the court of appeals and the Solicitor General recognized, this makes the EPA Rule a matter of national *public* importance. What matters is not the number of CERCLA suits brought against lenders (*see* CMA Opp. 1, 7 & nn.10,11; Mich Opp. 15), but the chilling effect on lending throughout the country that results from unclear CERCLA liability rules threatening to impose catastrophic liability on ordinary commercial lending practices.[1] The impact of the decision below extends far beyond commercial lenders and their "pecuniary interest" (Mich Opp. 14). Without the EPA Rule, many borrowers (including small businesses, inner city development projects, and businesses needing funds for hazardous waste clean-up) will suffer by being denied access to needed loans. The slow case-by-case rulings of the lower courts on the status of

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[1] Moreover, the court of appeals recognized that the EPA Rule would be robbed of effect if it were viewed simply as "policy guidance" for EPA enforcement proceedings: "[L]enders would still face potentially staggering liability because of the generality of the statutory language and the prospect of private suits. That potential liability would force lenders to behave cautiously even if EPA were to adhere to the regulation as its policy." App.15a.

secured lenders under CERCLA may never provide the clear, uniform "safe harbor" rules that make the EPA Rule effective. This is why EPA issued the Rule in the first place.

Though both the Federal Government and CMA mention the possibility of Congressional relief (Gov't Br.9; CMA Opp. 5-6), such relief may be years away, if it ever materializes. *See Superfund Reform Unlikely Until 1998, EPA Official Says*, BNA Daily Tax Report at G6 (November 21, 1994) ("While not everyone is predicting that reform will stall in the 104th Congress, nearly all sources involved in the reform effort during the 103rd Congress predicted that the chances are slimmer than before.") The issue of lender liability under CERCLA has bounced through the Judicial, Executive and Legislative branches for a decade, consuming vast amounts of intellectual and financial resources. The EPA Rule is a much-needed clarification of the law. It was wrongly struck down by the court of appeals. This Court should grant review.

2. Over-reading *Adams Fruit v. Barrett*, 494 U.S. 638 (1990), the court of appeals struck down the EPA Rule on its face, finding that the availability of private suits under CERCLA strips EPA of statutory rulemaking power on "liability" issues and deprives the EPA Rule of the deference on judicial review to which it is entitled under *Chevron v. NRDC*, 467 U.S. 837 (1984).[2] App.12a-13a. This

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[2] CMA's complaints about the merits of particular parts of the EPA Rule are not at issue before this Court. Moreover, CMA misdescribes the EPA Rule. (1) *Limited post-foreclosure protection*. Overlooked by CMA (CMA Opp.4, 5 n.6) is the fact that the EPA Rule only protects lenders when they act "consistent with accepted commercial

misreading of *Adams Fruit* converts it into an engine of destruction of agency rulemaking powers.

One of the provisions that the court below nullified is EPA's statutory authority

> to promulgate any regulations necessary to carry out the provisions of this subchapter

42 U.S.C. § 9615. If this is not a statutory delegation of agency rulemaking authority, supporting *Chevron* deference to the EPA Rule, nothing is. *See* 1 Davis & Pierce, *Administrative Law Treatise* § 6.3 p. 236 (3d ed. 1994) (statutory delegation of agency rulemaking power is "implicit" and triggers *Chevron* deference "if, for instance, Congress used ambiguous language in the statute and conferred upon the agency a general grant of power to promulgate legislative rules to implement the statute.")

The statutory delegation of rulemaking authority in 42 U.S.C. section 9615 gives EPA wide authority to "fill in the gaps" and to clarify CERCLA's statutory terms defining

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lending practices in the post-foreclosure context." 57 Fed. Reg. at 18,367 (April 29, 1992). Under the EPA Rule, lenders can be held liable if they cause post-foreclosure spills. *See* 57 Fed. Reg. at 18,357 (April 29, 1992); *United States v. Fleet Factors*, 821 F. Supp. 707 (S.D.Ga. 1993). (2) *No "windfall."* Contrary to CMA's assertions (CMA Opp.8), the EPA Rule states that "the United States will seek to recover any windfall or excess amount by which a person is unjustly enriched by means of a taxpayer-funded cleanup." 57 Fed. Reg. at 18,365. *See* 57 Fed. Reg. at 18,368 (Equitable Reimbursement of the Agency for Taxpayer-Financed Cleanups).

liability.[3] *See, e.g., Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369-370 (1973) (Truth in Lending Act disclosure requirements); *Touche Ross & Co v. SEC*, 609 F.2d 570, 577-582 (2d Cir. 1979) (SEC liability rules). As Chief Judge Mikva noted, in administering the CERCLA statute EPA routinely interprets CERCLA's liability provisions including CERCLA's "secured creditor exception," 42 U.S.C. § 9601(20)(A). *See* App.25a and *contrast* Mich Opp. 19, 22-23.

There is nothing in the CERCLA statute that purports to deprive EPA of rulemaking authority on "liability" issues.[4] Furthermore, CMA's and Michigan's claim that

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[3] The cases cited by CMA and Michigan are inapposite. *See Citizens to Save Spenser County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979) (CMA Opp.10) (court *upholds* the validity of EPA Rules issued under the Clean Air Act's general grant of rulemaking authority); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-308 (1979) (Mich Opp. 24) (statute authorizing collection of information does not authorize public disclosure); *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1303-1305 (D.C. Cir. 1991) (Mich Opp.24) (court upholds EPA's authority to add waste sites to CERCLA's "National Priorities List" even after statutory deadline, though court denies *Chevron* deference to EPA's view as to the consequences of its delay, finding no congressional intent to delegate to EPA "the authority to devise a remedy for its own untimeliness.")

[4] Nothing in CERCLA's general civil liability provisions, 42 U.S.C. § 9607(a), cited by CMA (CMA Opp. 9), cuts back EPA's rulemaking authority on CERCLA "liability" issues. Similarly, the obscure "structural" argument made by CMA (CMA Opp.9 n.12) falls far short of limiting

EPA is powerless to issue a Rule clarifying CERCLA's "secured creditor exemption" (42 U.S.C. § 9601(20)(A)) is refuted by well-settled principles of administrative law[5] and "good sense" *Citizens to Save Spenser County v. EPA*, 600 F.2d 844, 891 (D.C. Cir. 1979) (Leventhal, J., concurring): Though courts have jurisdiction to decide the final outcome of CERCLA suits (*see* 42 U.S.C. § 9613(b), cited in Mich Opp. 22,26), they should welcome the expert policy guidance of the EPA Rule on the meaning of CERCLA's "secured creditor exemption" (42 U.S.C. § 9601(20)(A)).

The sweeping oppositions of CMA and Michigan underline the need for this Court to grant review to clarify the relationship between *Adams Fruit* and *Chevron*. Essentially, CMA and Michigan claim that the EPA Rule is invalid because courts have jurisdiction to make the final

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or "overruling" EPA's explicit statutory rulemaking authority.

[5] The court of appeals ruling bars EPA from utilizing rulemaking (as opposed to case-by-case adjudication) to establish the metes and bounds of CERCLA "liability." This conflicts with well-settled principles of administrative law recognizing wide agency discretion to choose between rulemaking and adjudication. *See, e.g., American Hospital Association v. NLRB*, 499 U.S. 606, 611-614 (1991) ("even if a statutory scheme requires individualized determinations, the [agency] decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority"); *Vermont Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 543-545 (1978); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 201-205 (1956).

decision about CERCLA liability issues.[6] But the courts' final authority to determine "the law" is in no way inconsistent with *Chevron* deference to agency rules. *See* 1 Davis & Pierce, *Administrative Law Treatise* Chapter 3, especially § 3.3 (reconciling *Marbury* and *Chevron*).

Nor is there anything in the legislative history of CERCLA that trumps *Chevron* deference to the EPA Rule. The legislative history cited by CMA and Michigan (CMA Opp. 9 & n.13; Mich Opp. 27-30) indicates only that courts should look to common law principles to decide how to *apportion*, or divide, the total amount of CERCLA clean-up costs among liable defendants.[7] *See Developments in the Law-Toxic Waste Litigation*, 99 Harv.L.Rev. 1458, 1524-1539 (1986). The same point--that courts should determine how joint-and-several CERCLA liability is to be *allocated*--is reflected in 42 U.S.C. § 9613(f), cited by CMA (CMA Opp. 9).

This is a far cry from the court of appeals' ruling that

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[6] The opposition submitted by Michigan--which consistently overreads *Adams Fruit* (Mich Opp. 19-22)--at one point challenges the validity of all agency rules on "liability" by claiming that "civil and criminal statutes are not 'administered by any agency but by the courts'" (Mich Opp. 30-31).

[7] *See* H.R. Rep. 253(I), 99th Cong., 1st Sess. at 74 (1985) ("Explicit mention of joint and several liability was deleted from CERCLA in 1980 to allow courts to establish the scope of liability through a case-by-case application of 'traditional and evolving principles of common law' and pre-existing statutory law."); 126 Cong. Rec. 30,932 (1980) (statement of Senator Randolph).

Congress intended that only the courts (not EPA) would determine all CERCLA "liability" issues *de novo*. Whatever one thinks of "textualism" (*see The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer*, 16 Admin.L.News No. 4 (Summer 1991)), these snippets from CERCLA's legislative history provide no basis for nullifying the plain statutory text of CERCLA giving EPA wide rulemaking authority that is binding on private parties. 42 U.S.C. §§ 9615, 9605, 9613(a).

3. This case presents important and recurring questions about administrative law, and the EPA's powers under CERCLA, that warrant this Court's review. Understandably, the Federal Government hopes that the lower courts will ignore (or sharply limit) the court of appeals' decision misinterpreting *Adams Fruit* to undercut EPA's administrative powers. *See* Gov't Br.9-11 & nn. 6,7,8. But the rulings of the D.C.Circuit carry special weight on administrative law issues. *See* Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 Supreme Court Review 345, 371-375. And the lower courts are in fact in conflict on the meaning of *Adams Fruit* and the scope of EPA's administrative powers under CERCLA. *See Dico v. Diamond*, 35 F.3d 348 (8th Cir. 1994) (relying on court of appeals' decision in *Kelley* to cut back EPA authority under CERCLA section 106(b), creating an explicit conflict in the circuits between *Dico* and *Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992)).

The court of appeals' reliance on *Adams Fruit* to "overrule" the plain text of several CERCLA statutory provisions (42 U.S.C. § 9615, § 9605, § 9613(a), all relied upon by EPA in issuing the Rule, 57 Fed. Reg. at 18,368-18,369) makes it clear that this Court "should restate step

one of *Chevron* in simple, common sense terms" that explain the scope of *Adams Fruit* and clarify what does (and does not) trump *Chevron* deference to an agency's views. 1 Davis & Pierce, *Administrative Law Treatise* § 3.6 at p.130 (3d ed. 1994).

The validity of EPA's "Lender Liability Rule" is an issue of vital national importance that should be reviewed by this Court. This case also vividly illustrates the recurring confusion and conflict in the lower courts on *Chevron* "step one" and the proper interrelationship between *Adams Fruit* and *Chevron*. Review by this Court is imperative.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, certiorari should be granted.

Respectfully submitted,

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